

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on :14.08.2007

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OMP 52/2004

M/S HINDUSTAN INSECTICIDES LTD.

...Petitioner

- versus -

M/S CHLORITECH INDUSTRIES & ANR

...Respondent.

Advocates who appeared in this case:

For the Plaintiff : Mr Sanjiv Sharma

For the Defendant : None

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

BADAR DURREZ AHMED, J (ORAL)

1. The petitioner has filed Objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the said Act”) to part of the award made by Mr R.K. Aggarwal (Respondent No.2), who was the sole arbitrator. The award was made and published on 10.11.2003 at New Delhi. When the matter was called up nobody appeared on behalf of the respondents and, therefore, the matter was heard in the absence of the respondents.

2. The petitioner had invited offers for the supply of Chloral which is used in the manufacture of DDT by the petitioner. The respondent No.1 had submitted an offer on 27.3.2001 in respect of the said invitation. The same was accepted. The basic price quoted for Chloral was Rs 45.95 per Kg Ex-Works Nandesari in returnable packing, subject to the escalation/de-escalation clause as per the annexure with the tender. It was also mentioned in the offer that the said price of Chloral was based on the following price of raw-materials:-

“CHLORINE The Basic price of GACL as on 20.3.2001 is Rs 2700/- per MT (Rs 2460/- + Rs 250/-). Copy of Bill No 34706 dtd. 20.03.2001 is submitted herewith.”

With regard to escalation/de-escalation the following offer was made in terms of the tender document:-

“Basic price of Rs 45.95 Kg Chloral Ex-works Nandesari in returnable packing subject to escalation / de-escalation clause as per annexure with the Tender.”

3. The entire issue in the present petition is with regard to the working of the escalation/de-escalation clause in relation to the basic price of Chlorine. According to the petitioner, the basic price of Chlorine was quoted by the respondent No.1 itself at Rs 2700/- per MT on the date of the offer i.e., on 27.3.2001 and, therefore, any escalation/de-escalation has to be considered in relation to the said basic price of Rs 2700/- per MT of Chlorine. Before the learned arbitrator, the respondent No.1 had argued that the sum of Rs 2700/- per MT had been mentioned by mistake and the intention of the parties was indicated by the annexure to the tender document which related to the

parameters for escalation/de-escalation in Chloral. The relevant portion of the said annexure reads as under:-

“PARAMETERS FOR ESCALATION/DE-ESCALATION IN CHLORAL

(a) Chlorine: The basic price of M/s GACL, on the date of submission of tender and subsequently as and when revised by M/s GACL will be the basis of escalation/de-escalation irrespective of actual sourcing and price of Chlorine by Chloral supplier. The normative consumption of Chlorine per tonne of Chloral would be taken as 2.3 tonnes.”

4. Thus, according to the respondent No.1, the basic price of Chlorine was to be taken on the basis of the price of M/s GACL (Gujarat Alkalies and Chemicals Ltd.) on the date of the submission of the tender and subsequently as and when revised by GACL. According to the respondent No.1, the basic price of Chlorine on the date of submission of the tender was Rs 1500/- per MT and not Rs 2700/- per MT as had been mistakenly mentioned in the offer on 27.3.2001.

5. The learned counsel for the petitioner submitted that before the petitioner accepted the offer of the respondent No.1, it had kept in mind two parameters. The first, of course, being the price at which Chloral was offered. The second was the basic price of Chlorine. He submitted that it would make a marked difference if the basic price of Chlorine was to be accepted as Rs 1500/- per MT in place of Rs 2700/- per MT as quoted by respondent No.1. He submitted that it is obvious that the petitioner would prefer the quotation of the

basic price at Rs 2700/- per MT inasmuch as if there was an escalation to say Rs 3000/- per MT then the extent of the escalation, if the basic price of Rs 2700/- per MT was taken, would be only Rs 300/- per MT. Whereas, if the basic price is taken as Rs 1500/- per MT, the escalation in the Chlorine price would be to the extent of Rs 1500/- per MT. Consequently, based on the formula for normative consumption of Chlorine per ton of Chloral the escalation in the price of Chloral would be substantially different. He submitted that the learned arbitrator had gone wrong in not considering the basic price to be Rs 2700/- per MT as quoted but in directing that the basic price of Chlorine shall be the price fixed by GACL as on the date of the submission of the tender.

6. Before any further discussion on this aspect, a minor issue can be sorted out at this juncture itself. The learned arbitrator had given the date of submission of the tender as 30.3.2001. This, according to the learned counsel for the petitioner, was the last date of submission of the tender and not the actual date of submission of the tender by the respondent No.1. I agree with the submission made by the learned counsel for the petitioner that the date of submission of tender would be the date on which the respondent No.1 actually submitted the tender and that would be 27.3.2001 and not 30.3.2001.

7. Having disposed of this minor issue, the main question which remains to be decided is whether the price of Rs 2700/- per MT as quoted in the

offer of 27.3.2001 ought to be taken or should the actual basic price of Chlorine charged by GACL on that date, be taken. There is no doubt that some element of confusion and ambiguity has been introduced. The annexure to the tender document mentions that the basic price of Chlorine, as charged by GACL on the date of submission of the tender and subsequently as and when revised by GACL, would be the basis of escalation/de-escalation irrespective of the actual source and price of Chlorine by the Chloral supplier. The intention seems to be that irrespective of what the supplier quotes as the price, it is the basic price of Chlorine, as indicated by GACL on the date of submission of the tender, that would prevail. On the other hand, it is also true that in the offer document, the respondent No.1 had clearly and categorically quoted the basic price of Chlorine as Rs 2700/- per MT based on the actual price on 20.3.2001 in respect of Chlorine supplied by GACL. It is also true that the petitioner while evaluating the comparative merit of the offers received by it, would have been influenced by the fact that the basic price of Chlorine quoted in the offer was based on the price of GACL though of 20.3.2001. There is also no doubt that the respondent No.1 would have been given precedence to the respondent No. 1's offer over an offer made by another party where the basic price of Chlorine was quoted at rate lower than Rs 2700 per MT. So, on the one hand, the intention discernible from the annexure to the tender document is that the actual price of Chlorine, as charged by GSCL, was to be the only relevant consideration, on the other hand, it is apparent that the price quoted by the

respondent No.1 had a possibility of influencing the petitioner in accepting the offer of respondent No.1.

8. The learned counsel for the petitioner candidly submitted that after the purchase order was issued to the respondent No.1 stating the price of Chloral as well as the basic price of Chlorine, as indicated in the offer document, the respondent No.1 conditionally accepted the purchase order. One of the conditions was as under:-

“accepting the base price of chlorine at Rs 1500/- PMT for application of escalation/de-escalation clause.”

This clearly meant that the petitioner had issued the purchase order on the basis of a basic price of Chlorine of Rs 2700/- per MT, whereas the respondent No.1 had given its acceptance on the condition that the basic price of Chlorine would be Rs 1500/- per MT. As such, there was no *consensus ad idem* with regard to the basic price of Chlorine as on the date of the conditional acceptance of the purchase order. However, subsequently, the petitioner had accepted supplies from the respondent No.1, the effect of such acceptance has not been considered by the learned arbitrator nor does it appear to have been argued. The learned counsel for the petitioner submits that such a discussion would fall within the realm of novation of contract and there is no apparent discussion on this aspect of the matter.

9. In view of the above discussion, I feel that it would be appropriate that this part of the award which deals with the basic price of Chlorine requires to be set aside and the matter be remanded for arbitration either to the same arbitrator or to another arbitrator appointed in accordance with the arbitration agreement between the parties. It would be necessary that the question of novation, if any, of the contract and agreement between the parties with regard to the basic price of chlorine is also determined by the arbitrator.

10. Accordingly, this petition is allowed to the extent that the award is set aside in respect of paragraph “a” of the operative portion of the award and the same is remanded for arbitration afresh before, either the same arbitrator or any other arbitrator appointed in terms of the arbitration agreement.

This OMP stands disposed of.

**BADAR DURREZ AHMED
(JUDGE)**

August 14, 2007
J